Opinion issued March 15, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00791-CV

IN THE INTEREST OF E.C.R.

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 201004599J

O P I N I O N

In this accelerated appeal, appellant M.R. challenges the trial court's decree terminating M.R.'s parental rights to her minor child, E.C.R. In two issues, M.R. argues that the evidence was legally and factually insufficient to support the termination of her rights under Texas Family Code section 161.001(1)(O) and legally and factually insufficient to support the finding that the termination of M.R.'s rights was in the best interest of the child under Texas Family Code section

161.001(2). TEX. FAM. CODE ANN. § 161.001 (West 2011). We reverse and render in part and affirm in part.

Background

The Department of Family and Protective Services removed E.C.R. from the care of his mother, M.R., on or around June 25, 2010. On July 8, 2010, the trial court signed temporary orders giving DFPS temporary managing conservatorship of E.C.R. Over one year later, after a bench trial conducted on August 18, 2011, the trial court terminated M.R.'s parental rights. Although DFPS had urged the trial court to find that termination was appropriate under three subsections of Family Code section 161.001, the trial court found that termination was warranted only under section 161.001(1)(O).

The evidence at trial demonstrated that E.C.R. was taken into DFPS's custody "due to risk of [E.C.R.] being physically abused by the mother[.]" The caseworker, Ehiomen Etinfoh, explained that law enforcement had been called to an incident in which M.R. was allegedly abusing her four-year-old daughter, Y.C. According to an investigator, a witness reported seeing M.R. drag Y.C. by her ponytail down the street at Interstate 45 and Greens Road. When the police arrived they observed Y.C. had a bruised lip, a cut on her forehead, dried blood on her nose and fresh bruising on her right ear and left eye. Etinfoh further explained that, while E.C.R. was not present during that incident, the incident resulted in

M.R.'s being arrested and charged with injury to a child, Y.C. Etinfoh also explained that M.R. pleaded guilty and received four years' deferred adjudication community supervision.

In addition to her testimony regarding the incident that resulted in M.R.'s guilty plea, Etinfoh testified that, while M.R. had completed some services, she had not completed the "big" services required by the court's service plan, i.e., the psychiatric evaluation and psychological treatment. She testified that M.R. had not found employment and that M.R. had lost custody of another son, A.J. Etinfoh testified that E.C.R. was "very behind in his immunizations" and that E.C.R. "had to be caught up, up until he turned one years old on his shots" because M.R. "was not taking care of his medical needs." When asked about E.C.R.'s home environment, Etinfoh admitted that she was not personally aware of E.C.R.'s home environment, but also said that M.R. admitted to Etinfoh in the year before the trial that M.R. was "moving from house to house." Etinfoh did not offer evidence of where M.R. was living or when or how frequently she moved. Etinfoh testified that M.R. attempted to kill herself while she was in prison on the injury to a child charge and that M.R. had given birth to another child, younger than E.C.R., who currently lived in the same foster home as E.C.R. In short, Etinfoh testified that she believed termination was in the best interest of E.C.R. because M.R. could not provide him with a proper, stable environment, her mental status was questionable,

she had not completed the psychiatric evaluation, and she was unemployed. On cross-examination, Etinfoh confirmed that E.C.R. came into DFPS's care "based on risk" due to the allegation of injury to his sibling.

Lucinda Thomas, the child advocate, confirmed her belief that M.R. should be removed "based upon alleged physical risk." She testified that M.R. had failed to complete the required psychiatric and psychotherapy treatments and that M.R. had not lived in a home or had a job for six months. According to Thomas, M.R. claimed she was unable to find a job due to complications with her last pregnancy but M.R. had not given Thomas any documentation of her inability to work. Thomas testified that as of the date of the hearing she recommended termination of M.R.'s parental rights based on alleged physical risk to E.C.R. and the fact that M.R. had not completed her services.

M.R. also testified at the termination hearing. M.R. confirmed that she was E.C.R.'s mother. M.R. admitted that she had lost custody of another child in a different child protection case and that she received deferred adjudication for the injury to a child charge resulting from the incident involving Y.C. M.R. also testified that E.C.R. was living in a safe environment in June 2010 when he was removed from her care and she never told the caseworker otherwise.

At the conclusion of the bench trial, the trial court announced its ruling that M.R.'s parental rights were terminated based on section 161.001(1)(O) but not on

other grounds urged by DFPS. On September 6, 2011, the trial court entered a decree terminating M.R.'s parental rights. The court found that termination was in the best interest of E.C.R. and that there was clear and convincing evidence to terminate M.R.'s parental rights under section 161.001(1)(O). The court named DFPS as E.C.R.'s sole managing conservator, finding that that it was not in E.C.R.'s best interest for the court to appoint a parent, relative, or other person.

Termination of Parental Rights

In order to terminate parental rights under section 161.001 of the Family Code, the petitioner must establish that the parent engaged in conduct enumerated in one or more of the subsections of section 161.001(1) and must also show that termination of the parent-child relationship is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2011); *Richardson v. Green*, 677 S.W.2d 497, 499 (Tex. 1984). The petitioner must prove both prongs and may not rely solely on a determination that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001; *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

It is well-established that parental rights are of constitutional dimension and are "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212. Because of the great importance of parental rights, grounds for termination must be

supported by clear and convincing evidence rather than a mere preponderance. TEX. FAM. CODE ANN. § 161.001; *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002). Clear and convincing evidence refers to a degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the truth of the allegations sought to be proved. *In re C.H.*, 89 S.W.3d at 25.

A. Standard of Review

When reviewing the legal sufficiency of the evidence in a case involving termination of parental rights, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that there existed grounds for termination under section 161.001(1) and that termination was in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(1), (2); *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). In doing so, we examine all evidence in the light most favorable to the finding, assuming that the "factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.*, 96 S.W.3d at 266. We must also disregard all evidence that the factfinder could have reasonably disbelieved or found to be incredible. *Id.* However, we must be careful not to disregard all of the evidence that does not support the finding, as doing so could "skew the analysis of whether there is clear and convincing evidence." *Id.*

When conducting a factual sufficiency review of the evidence in a termination of parental rights case, we examine the entire record to determine

whether "the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction" that the two prongs of section 161.001 were met. *In re J.F.C.*, 96 S.W.3d at 266; *see* TEX. FAM. CODE ANN. § 161.001. If the evidence that could not be credited in favor of the finding is so great that it would prevent a reasonable factfinder from forming a firm belief or conviction that either termination was not in the best interest of the child, or none of the grounds under section 161.001(1) were proven, the evidence will be factually insufficient and the termination will be reversed. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.F.C.*, 96 S.W.3d at 266.

B. Texas Family Code section 161.001(1)(O)—Failure to comply with a court order

In her first point on appeal, M.R. contends that the evidence is legally and factually insufficient to support termination of her parental rights under section 161.001(1)(O). For a court to terminate parental rights under section 161.001(1)(O), the court must find by clear and convincing evidence that the parent:

> [F]ailed to comply with the provisions of a court order that specifically established the actions necessary for a parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the [DFPS] for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

TEX. FAM. CODE § 161.001(1)(O).

M.R. does not dispute that DFPS had temporary managing conservatorship of E.C.R. for more than nine months or that she failed to complete the actions necessary to obtain the return of E.C.R. as set forth in the trial court's temporary orders. Rather, M.R.'s sole argument on appeal is that DFPS did not establish by clear and convincing evidence that E.C.R. was removed from M.R.'s care *as a result of M.R.'s abuse or neglect of E.C.R.*

For a trial court to terminate parental rights under section 161.001(1)(O), it must find that the child who is the subject of the suit was removed as a result of the abuse or neglect of that specific child. *See Mann v. Dep't of Family and Protective Servs.*, No. 01–08–01004–CV.2009 WL 2961396, at *6 (Tex. App.—Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.) (section 161.001(1)(O) requires that trial court find by clear and convincing evidence that child who is the subject of the suit was removed as a result of the abuse or neglect of parent) (citing *In re A.A.A.*, 265, S.W.3d 507, 512–516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)). We previously have held that evidence of abuse or neglect of a sibling does not support termination under section 161.001(1)(O). *See Mann*, 2009 WL 2961396, at *6–7.

Here, DFPS argues that the conduct of M.R. towards her daughter Y.C., E.C.R.'s sibling, supports the trial court's finding that E.C.R. was removed from M.R.'s care as a result of abuse or neglect. While M.R's abusive conduct toward

Y.C. may have jeopardized E.C.R.'s well-being and served as evidence to support termination under section 161.001(1)(E), it is not evidence that E.C.R. actually sustained abuse or was neglected by M.R. *See* TEX. FAM. CODE ANN. § 161.001(1)(E); *See Mann*, 2009 WL 2961396, at *6 (citing *Cervantes-Peterson v. Tex. Dep't of Family and Protective Services*, 221 S.W.3d 244, 253 (Tex. App.—Houston [1st Dist.] 2006, no pet.)); *see also In re D.M.*, 58 S.W.3d 801, 811 (Tex. App.—Fort Worth 2001, no pet.) (proving the element of a parent's endangering act under section 161.001(1)(E) "may be satisfied by showing the parent in question engaged in a course of conduct that endangered the child's physical or emotional well-being"). Thus, M.R.'s abuse of Y.C. cannot be considered evidence that M.R. abused or neglected E.C.R. under section 161.001(1)(O).

DFPS argues that three other pieces of evidence support termination under section 161.001(1)(O): (1) temporary orders signed by the trial judge on July 8, 2010 finding "danger to the physical health or safety" of E.C.R., as well as "a substantial risk of a continuing danger if the child is returned home," (2) the language in the August 2, 2010 Family Service Plan that shows M.R. was, at that time, living on the streets and did not have family or friends who could assist her, and (3) Etinfoh's testimony that E.C.R. was behind in his immunizations and M.R. "was not taking care of his medical needs." In *In re A.A.A.*, we stated that whether

a child was removed due to the abuse or neglect of the parent should be determined on a case-by-case basis. *In re A.A.A.*, 265 S.W.3d at 515. Because other cases are instructive in making this determination, we will examine previous courts of appeals holdings. *See Mann*, 2009 WL 2961396, at *6.

The cases in which courts of appeals have concluded that the evidence was sufficient to find that a child's removal was based on abuse or neglect contain specific allegations of neglect or abuse in the record. In *In re M.G.*, the Fourteenth Court of Appeals found that the evidence was sufficient to terminate a mother's parental rights to her child under section 161.001(1)(O), in part, because the initial intake report stated that "appellant was mentally and physically neglectful of M.G." *In re M.G.*, 2009 WL 3818856, No. 14-09-00136-CV, at *8 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (mem. op). Other evidence included a statement from a DFPS worker that while speaking to the mother on the phone the mother seemed unconcerned with M.G.'s cries that the DFPS worker could hear in the background. *Id.* at *8. In addition, DFPS showed that the mother had kicked out windows on a public bus while M.G. was present, and that doctors had diagnosed the mother as having "paranoid concerns" and delusions that could be detrimental to M.G.'s development. *Id.* In *In re E.S.C.*, the Dallas Court of Appeals determined that the evidence was sufficient to support termination of a mother's parental rights to four siblings under section 161.001(1)(O) in a case in

which DFPS's referral explicitly alleged negligent supervision of the children. *In re E.S.C.*, 287 S.W.3d 471, 473, 475 (Tex. App.—Dallas 2009, pet. denied). The record in *E.S.C.* also demonstrated that the mother's mental condition prior to removal caused her to suffer visual and audio hallucinations, and "suicidal, homicidal ideations." *Id.* at 473. She did not know where two of her children resided and had no one to care for the children while she was hospitalized. *Id.* The trial court also was presented with detailed evidence regarding the medical condition of the children, including evidence that one child had impetigo, a staph infection, and hair loss, and that the mother had not sought treatment for any of these conditions. *Id.* at 475. Finally, in *In re S.N.*, our sister court concluded the evidence was sufficient to support termination of a mother's parental rights under section 161.001(1)(O) when the record demonstrated that she left her children home alone for hours, and officers who arrived at the home found a soiled mattress, cat feces overflowing from litter boxes, the sink overflowing with dirty dishes, and spoiled milk in the refrigerator. *In re S.N.*, 287 S.W.3d 183, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.)

By contrast, in *Mann v. DFPS*, this court reversed a termination decree under section 161.001(1)(O) because there was insufficient evidence of abuse or neglect of the child. *See Mann*, 2009 WL 2961396, at *7. The evidence in *Mann*, as in this case, demonstrated that the mother had abused an older sibling. *Id.*

DFPS showed the mother failed to obtain prenatal care until she was ordered to do so in the seventh month of pregnancy, failed to comply with the service plan ordered in a case involving another one of her children, and failed to secure housing at the time of the child's birth. *Id.* But the caseworker in *Mann* testified that upon entering DFPS care, the child was healthy, had not been abused or neglected, and had been removed due to risk rather than actual abuse or neglect. *Id.* at *6. Similarly, in *In re S.A.P.*, a DFPS caseworker testified that the child had not been removed for abuse or neglect but rather because of a risk of harm to the child as a result of the parent's conduct towards the child's siblings. *In re S.A.P.*, 169 S.W. 3d 685, 705–706 (Tex. App.—Waco 2005, no pet.) The Waco Court of Appeals reversed, holding there was no evidence to support termination of S.A.P. under section 161.001(1)(O). *Id.*

Here, as in *Mann*, the caseworker testified that the child was removed as a result of risk of abuse due to abuse of his older sibling. Unlike the evidence presented in *In re M.G.* and *In re E.S.C.*, the evidence here does not show neglect or negligent supervision of the child as a reason for DFPS involvement. *See In re M.G.*, 2009 WL 3818856, at *8; *In re E.S.C.*, 287 S.W.3d at 473. While Etinfoh testified that E.C.R. was "very behind" in his immunizations when he came into DFPS custody, the record does not show that this factor or any other allegation of abuse or neglect of E.C.R. led to E.C.R.'s removal. In fact, the Family Service

Plan and Etinfoh's testimony both show that DFPS became involved as a result of M.R.'s abuse of E.C.R.'s sibling, a factor that the court could not consider in reaching a finding under section 161.001(1)(O). *See Mann*, 2009 WL 2961396, at *6.

DFPS also points to the Family Service Plan that shows as of August 2, 2010, M.R. was living on the streets and did not have a support system as evidence of her abuse or neglect of E.C.R. In *Mann*, this court held that the mother's failure to obtain housing at the time of the child's birth did not establish abuse or neglect because the child was staying at his great-grandmother's house, and the record did not reflect frequent relocation during time the mother was caring for the child, or that child was exposed to unsafe or unsanitary conditions. *See Mann*, 2009 WL 2961396, at *7. The language in the Family Service Plan here stated that M.R. was "currently" living on the streets "as of" August 2, 2010. The plan was written over one month after E.C.R.'s initial removal from M.R., on or about June 25, 2010, and almost one month after the adversary hearing on July 8, 2010, in which DFPS was given temporary conservatorship of E.C.R. Even considering the language in the Family Service Plan along with Etinfoh's testimony that M.R. told her that "last year" that she was "moving house to house," these statements, without more detail as to when this occurred or whether it was E.C.R. as opposed to M.R. that

was in an unsafe or unstable living environment, cannot be considered evidence of abuse or neglect of E.C.R.

Examining all of the evidence in the light most favorable to the trial court's judgment and disregarding all evidence the factfinder could have reasonably disbelieved or found incredible, we hold that a reasonable factfinder could not have formed a firm belief or conviction that E.C.R. was removed from M.R.'s care as a result of M.R.'s abuse or neglect of E.C.R. We hold that the evidence is legally insufficient to support termination of M.R.'s under section 161.001(1)(O).

We sustain M.R.'s first issue.

C. Alternative grounds for termination urged by DFPS

DFPS requests that this court consider two cross points and affirm the termination of M.R.'s parental rights under either section 161.001(1)(L) or section 161.001(1)(E), the two other grounds for termination pleaded in DFPS's original pleadings. Although DFPS sought termination under these two provisions in its original petition, the trial court did not terminate M.R.'s rights under either of them.

In *Vasquez*, we held that "a parental rights termination order can be upheld only on grounds both pleaded by [DFPS] and found by the trial court." *Vasquez v. Texas Dep't of Protective & Regulatory Servs.*, 190 S.W.3d 189, 194 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). DFPS asserts that the Legislature's

recent repeal of Texas Family Code section 263.405(i) means that we are now free to consider cross appeals such as these.[1] We agree with DFPS that with the repeal of Texas Family Code section 263.405(i), appellate courts are now permitted to review points raised on appeal that were not included in a statement of appellate points. But we disagree with DFPS's conclusion that the repeal of section 263.405(i) means we are free to uphold termination based on findings not made by the trial court. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 176, § 1, 2005 Tex. Gen. Laws 332, 332, *repealed by* Act of May 5, 2011, 82nd Leg., R.S., ch. 75, § 5, 2011 Tex. Gen. Laws 348, 349. The repeal of Texas Family Code section 263.405(i) does not affect our holding in *Vasquez*, and we reaffirm that "a parental rights termination order can be upheld only on grounds both pleaded by the [DFPS] and found by the trial court." *Vasquez*, 190 S.W.3d at 194 (stating "we decline [DFPS's] invitation to uphold the trial court's termination order on a ground different from that stated in the order"); *see also Cervantes-Peterson*, 221 S.W.3d at 252 ("[W]e review the sufficiency of the evidence presented under the specific statutory grounds found by the trial court in its termination order.").

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[1] Former Texas Family Code section 263.405(i) stated in part, "The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial." Act of May 12, 2005, 79th Leg., R.S., ch. 176, § 1, 2005 Tex. Gen. Laws 332, 332, *repealed by* Act of May 5, 2011, 82nd Leg., R.S., ch. 75, § 5, 2011 Tex. Gen. Laws 348, 349.

Because we conclude that the evidence is legally insufficient to support termination under section 161.001(1)(O), the sole ground on which the trial court terminated M.R.'s parental rights, we need not reach the merits of M.R.'s second issue.

Conclusion

We reverse the portions of the decree related to the termination of M.R.'s parental rights and render judgment denying DFPS's petition for termination of M.R.'s parental rights. We affirm the remainder of the judgment.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Huddle.